ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1338 (related to Nos. 11-1302, 11-1315, and 11-1323)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF TEXAS, THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, THE PUBLIC UTILITY COMMISSION OF TEXAS, THE RAILROAD COMMISSION OF TEXAS, AND THE TEXAS GENERAL LAND OFFICE,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA P. JACKSON, ADMINISTRATOR,
Respondents.

On Petition for Review of an Action of the
United States Environmental Protection Agency

PETITIONERS' MOTION FOR PARTIAL STAY OF FINAL RULE

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In accordance with Federal Rule of Appellate Procedure 18, petitioners the State of Texas, the Texas Commission on Environmental Quality, the Public Utility Commission of Texas, the Railroad Commission of Texas, and the Texas General Land Office ("Texas" or "the State," collectively) move for a partial stay of respondent United States Environmental Protection Agency's ("EPA's") final rule entitled Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone, and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the "Final Rule") (Exh. B). This motion follows Texas's and several other parties' requests for a similar stay from EPA[1]—requests that have so far gone unanswered. *See* FED. R. APP. P. 18(a)(1)-(2); D.C. CIR. R. 18(a)(1).

INTRODUCTION AND SUMMARY

The Clean Air Act ("CAA") requires EPA "to issue national ambient air quality standards ('NAAQS')" that the States must meet within their borders. *North Carolina v. EPA*, 531 F.3d 896, 901-02 (D.C. Cir. 2008) (per curiam). It also contains a "good neighbor" provision aimed at preventing any one State from "contribut[ing] significantly to nonattainment in, or interfer[ing] with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i)(I).

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1. *See, e.g.*, Petition for Reconsideration and Stay, State of Texas et al., Docket No. EPA-HQ-OAR-2009-0491 (filed Sept. 8, 2011); Initial Petition for Reconsideration and Request for Stay, Southwestern Public Service Company, Docket No. EPA-HQ-OAR-2009-0491 (filed Aug. 23, 2011); Request for Partial Reconsideration and Stay, Luminant Generation Company LLC et al., Docket No. EPA-HQ-OAR-2009-0491 (filed Aug. 5, 2011). Texas's counsel notified respondents' counsel by telephone that this motion would be filed today.

In 2005, EPA promulgated a rule under this provision—the Clean Air Interstate Rule, or CAIR—that the Court subsequently concluded was invalid. *North Carolina*, 531 F.3d at 930, *relief altered on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). The Court remanded the matter to EPA without vacatur, allowing CAIR's requirements to remain in effect temporarily. *Id.* EPA ultimately responded to the Court's remand order by replacing CAIR with the Final Rule.

Although portions of the voluminous Final Rule may be lawful, the portions relevant to Texas are not. Because EPA failed to provide Texas notice of several critical aspects of the rule, Texas was unable to submit meaningful comments that, had they been made, would have significantly changed the Final Rule. *See infra* Part I.A. Additionally, the Final Rule violates the CAA by requiring Texas to reduce its emissions far more drastically than necessary to eliminate its modeled significant contribution to a single monitor in Illinois that currently reflects NAAQS attainment. *See infra* Part I.B.

Texas is likely to succeed on the merits of these and other claims, and an immediate stay of the Final Rule as it applies to Texas is needed to prevent irreparable injury. Absent a stay, the Final Rule will cause Texas citizens and businesses to suffer rolling blackouts if, as forecasted, current weather conditions persist in 2012. *See infra* Part II.A. Although that is harm enough, failure to stay the Final Rule will also result in the loss of hundreds of jobs, not to mention tax revenue that cities, schools, and other public-service providers depend on. *See infra* Part II.B. Finally, because granting a stay

of the Final Rule as it applies to Texas would pose no serious threat of harm to other parties and would further the public interest, *see infra* Part III, the Court should grant relief without delay.

FACTUAL BACKGROUND

In early August 2010, EPA published the proposed rule on which the Final Rule is based. Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210 (proposed Aug. 2, 2010) (the "Proposed Rule") (Luminant Exh. 4).[2] The Proposed Rule announced EPA's intent to issue federal implementation plans ("FIPs") that would "limit the interstate transport of emissions of nitrogen oxides (NO_X) and sulfur dioxide (SO_2) . . . within 32 states in the eastern United States that affect the ability of downwind states to attain and maintain compliance with the 1997 and 2006 fine particulate matter ($PM_{2.5}$) [NAAQS] and the 1997 ozone NAAQS." *Id.* at 45,210.

The Proposed Rule, however, did not identify any significant contribution of emissions from Texas with respect to either the 2006 24-hour $PM_{2.5}$ NAAQS or the 1997 annual $PM_{2.5}$ NAAQS. *Id.* at 45,215. Rather, it announced an intent to require Texas to reduce only its ozone-season NO_X emissions, *id.*, and it therefore provided no emissions budgets for Texas for either annual NO_X or annual SO_2. *See* Final Rule, 76

2. In this motion, "Luminant Exh." refers to the exhibits attached to Petitioners' Motion for Partial Stay of EPA's Final Transport Rule, *Luminant Generation Co. v. EPA*, No. 11-1315 (D.C. Cir. Sept. 15, 2011).

Fed. Reg. at 48,212, 48,214 (describing the significance of State-specific emissions budgets and noting their absence, in the Proposed Rule, as to Texas).

The Final Rule is surprisingly different. It requires substantial reductions of Texas's annual NO_X and SO_2 emissions, and it does so based on a new finding that Texas contributes significantly to downwind nonattainment with respect to the 1997 annual $PM_{2.5}$ NAAQS. *Id.* at 48,214-15. The Final Rule also establishes a FIP for ozone and annual $PM_{2.5}$ and specifies emissions budgets for Texas for annual SO_2, annual NO_X, and ozone-season NO_X, *id.* at 48,262-63 (Tables VI.D-3, VI.D-4), requiring Texas electric generating units ("EGUs") to comply with specific emissions allocations beginning January 1, 2012, *id.* at 48,211—less than five months after the Final Rule's August 8, 2011 publication in the Federal Register, *id.* at 48,208.

The inclusion of Texas in the Final Rule is based on modeling, also presented for the first time in the Final Rule, predicting that Texas will, in 2012, contribute significantly to annual $PM_{2.5}$ nonattainment at a single air-pollution monitor several States away: the Granite City monitor in Madison County, Illinois. *Id.* at 48,213, 48,240-41 (Tables V.D-1, V.D-2). This modeling put Texas just barely over the "significance" line; it predicted that Texas's annual $PM_{2.5}$ contribution would be 0.18 $\mu g/m^3$, *id.* at 48,240 (Table V.D-1)—a mere 0.03 $\mu g/m^3$ over the 0.15 $\mu g/m^3$ significance threshold. *Id.* at 48,236.

This is true even though, as already noted, the Proposed Rule had not found

Texas to be contributing significantly to annual $PM_{2.5}$ nonattainment. 75 Fed. Reg. at 45,215; *see id.* at 45,255 (Table IV.C-13). Indeed, the Proposed Rule called for comment on whether Texas should be included in the Final Rule on just one basis: the prospect that exclusion of Texas from the Final Rule's scope would reduce the price to Texas EGUs of high-sulfur coal, which in turn could cause the EGUs that purchased and burned that coal to begin contributing significantly to downwind nonattainment and maintenance-interference in other States. *Id.* at 45,284.

Among other parties, the Texas Commission on Environmental Quality provided comments critical of that proposed basis for including Texas. *See, e.g.*, Comment submitted by Mark R. Vickery, Executive Director, Tex. Comm'n on Envtl. Quality, Document No. EPA-HQ-OAR-2009-0491-2857 (posted Oct. 7, 2010). But EPA rendered those comments irrelevant by abandoning its initial theory and choosing to include Texas in the Final Rule based only on its new modeling of the Granite City monitor. 76 Fed. Reg. at 48,213, 48,240-41 (Tables V.D-1, V.D-2).

In this regard, EPA's treatment of Texas differed notably from its treatment of other States. EPA linked six other States to new monitors in the Final Rule, but it offered each of those States an opportunity to comment on the linkage. Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone, 76 Fed. Reg. 40,662 (proposed July 11, 2011). Yet EPA failed to provide Texas the same opportunity.

And although EPA's new modeling suggests that Texas would just barely exceed the relevant significance threshold, the Final Rule's previously undisclosed emissions budgets for Texas mandate substantial reductions in both annual NO_X and SO_2. *Id.* at 48,269. Indeed, as explained below, the Final Rule's required reductions for Texas are more onerous than those for other States whose significant contributions to downwind nonattainment and maintenance-interference far exceeded those of Texas.

ARGUMENT

The Court considers four factors when determining whether to grant a stay: (1) the likelihood that the movant will prevail on the merits; (2) the prospect of irreparable injury to the movant if relief is denied; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. CIR. R. 18(a)(1). As shown below, each factor favors granting a stay.

I. TEXAS IS LIKELY TO SUCCEED ON THE MERITS.

A. Texas Had Neither Adequate Notice Nor a Meaningful Opportunity to Comment on the Rule.

1. Settled precedent requires adequate notice and an opportunity for meaningful comment on the key elements of an EPA rule.

In "afford[ing] interested parties a reasonable opportunity to participate in the rulemaking process," *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation mark omitted), adequate notice is fundamental to sound

administrative decision-making and judicial review. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)). Here, two statutes required EPA to provide Texas and other interested parties adequate notice of the rule and its underlying support. The APA required EPA to publish a notice of proposed rulemaking that included "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), and the CAA required EPA to provide a statement of the Proposed Rule's basis and purpose that included "a summary of—(A) the factual data on which the proposed rule [wa]s based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3); *see Small Refiner*, 705 F.2d at 518-19 (discussing this provision).

As the Court has frequently explained, a proposed rule and a final rule may permissibly differ "only insofar as the latter is a 'logical outgrowth' of the former," *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citing *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (per curiam)), and a final rule is a "logical outgrowth" of a proposed rule only if interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir.

2003) (per curiam)); *see Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

In light of these requirements, notice is adequate only if it allows interested parties a chance to provide "meaningful" comments, and comments can be meaningful only if parties are made aware of what, specifically, they need to comment on. *See Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002); *Small Refiner*, 705 F.2d at 518-19, 548. "If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Envtl. Integrity Project*, 425 F.3d at 998.

Adequate notice is particularly important when an agency relies on scientific studies or data to support a final rule. As the Court has explained, "[i]ntegral to the notice requirement is the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.'" *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (per curiam) (quoting *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982)); *see Kennecott Corp. v. EPA*, 684 F.2d 1007, 1017-20 (D.C. Cir. 1982); *Sierra Club v. Costle*, 657 F.2d 298, 334, 397-98 & n.484 (D.C. Cir. 1981).

Along these same lines, the Court has explained that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate

data, or on data that, [to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). For that reason, post-comment publication of the key methodology underlying a rule cannot provide adequate notice where the methodology is an integral part of the agency's model. *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201-02 (D.C. Cir. 2007); *see Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978).

2. EPA failed to provide Texas adequate notice.

Texas's notice claim is likely to succeed on at least two grounds. First, the Proposed Rule gave Texas no notice either that it would be significantly linked to a $PM_{2.5}$ monitor or of the factual data and methodology underlying that linkage, and Texas was therefore unable to comment on significant errors before they appeared in the Final Rule. Second, because the Proposed Rule did not include SO_2 or annual NO_X emissions budgets for Texas, Texas had no opportunity to comment on the detrimental effects the Final Rule would have and identify further problems that EPA should have considered.

On the first point, notice of Texas's significant linkage to the Granite City monitor would have caused Texas to provide comments identifying several problems with reliance on that monitor in the Final Rule. For one thing, the monitor is currently in attainment status for the annual $PM_{2.5}$ NAAQS. *See* Approval and Promulgation of Air Quality Implementation Plans; Illinois; Missouri; Saint Louis Nonattainment Area; Determination of Attainment of the 1997 Annual Fine Particle Standard, 76 Fed. Reg.

29,652 (May 23, 2011) ("Determination of Attainment"). Additionally, the monitor is heavily influenced by local conditions—specifically, a nearby steel mill that is the proximate cause of any past exceedances of the $PM_{2.5}$ NAAQS. *See id.* at 29,653.

In short, adequate notice would have allowed Texas to show that EPA failed to reconcile its model of Texas's projected significant contribution with real-world conditions. And EPA could hardly claim that such comments on its previously undisclosed data and methodology would not have altered the Final Rule. This is the type of information that EPA credits, as it must. *NRDC v. Jackson*, Nos. 09-1405, 10-2123, 2011 WL 2410398, at *3 (7th Cir. June 16, 2011) (Easterbrook, C.J.) (observing that "[t]he way to test a model is to compare its projection against real outcomes" and that "[a]n agency that clings to predictions rather than performing readily available tests may run into trouble" (citing *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)); *see, e.g.*, Final Rule, 76 Fed. Reg. at 48,259 (concluding that, because "the Liberty-Clairton area is significantly affected by local emissions from a sizable coke production facility and other nearby sources," it would not be appropriate to use data recorded at a monitor in that area to establish a higher cost threshold for upwind States' emissions reductions).

EPA's failure to provide Texas notice of its new significant linkage to the Granite City monitor is all the more striking when juxtaposed with EPA's treatment of other States. As already noted, EPA provided supplemental notice to six other States found to have new significant linkages to air-pollution monitors. *See supra* at 5. In so doing,

EPA reflected its own understanding of the critical need for States to have this information so that they could review the underlying data and methodology for errors. *See supra* Part I.A.1 (discussing the relevant case law). EPA's failure to disclose the corresponding information relevant to Texas violates fundamental notice requirements and is a basis for vacatur of the Final Rule. *See, e.g.*, *Envtl. Integrity Project*, 425 F.3d at 998; *Int'l Union*, 407 F.3d at 1261.

Second, EPA's failure to provide emissions budgets for Texas in the Proposed Rule prevented Texas from identifying and commenting on problems with EPA's emissions-reduction requirements and the substantial impact the Final Rule would have in the State. *See* Energy Future Holdings Corp. & Energy Future Competitive Holdings Co., Current Report (Form 8-K), at 2-3 (Sept. 12, 2011) ("Form 8-K") (Exh. C) (reflecting that the Final Rule has already caused one Texas corporation to announce the shut-down of several of its major operations). And again, this problem was unique to Texas; every other State covered by the Final Rule was given proposed emissions budgets to review and comment on.

The lack of emissions budgets for Texas was particularly problematic because it deprived the State of any opportunity to comment on the cost-benefit analysis that determines the amount of required reductions. *See* Proposed Rule, 75 Fed. Reg. at 45,270-85. The central question of what costs EGUs would actually have to incur to meet EPA's emissions budgets could not be answered without knowing what the

budgets were. And the lack of that information caused direct harm because EPA's own cost-benefit analysis did not specifically evaluate Texas.

EPA's conclusion that Texas EGUs could make the required emissions reductions at a cost of only $500/ton of SO_2, *see* Final Rule, 76 Fed. Reg. at 48,251-52, was based on several factual and analytical errors. For instance, in projecting power-industry compliance in 2012, EPA assumed year-round operation of existing air-pollution controls, operation of scrubbers that are currently scheduled to come online by 2012, fuel-switching (to lower-sulfur coal), and increased reliance on lower-emitting generation units. *Id.* at 48,279-81.

Had it received adequate notice of its inclusion in the Final Rule for annual $PM_{2.5}$, Texas would have commented on these assumptions' specific inapplicability in Texas. *See, e.g.*, ELEC. RELIABILITY COUNCIL OF TEX., INC., IMPACTS OF THE CROSS-STATE AIR POLLUTION RULE ON THE ERCOT SYSTEM 3-6 (2011) ("ERCOT Report") (Luminant Exh. 9, Lasher Decl. Exh. 1) (discussing real-world compliance options for Texas EGUs and the effect that the Final Rule would have on the State). It would also have noted several significant factual and methodological errors in EPA's analysis, such as EPA's substantial overestimation of wind-generated power available in Texas, Declaration of Warren P. Lasher (Sept. 21, 2011) ("ERCOT Decl.") (Exh. D) ¶ 24, and its erroneous inclusion of several thousand more megawatts of generation capacity than are actually available. *Id.* ¶ 25-27; *see also* Luminant Exh. 9, K. Smith Decl. ¶¶ 10-20 (reflecting

Luminant's critique of EPA's assumptions); Goering Decl. ¶¶ 8-20 (same).

B. The Final Rule Violates the CAA by Requiring Texas to Reduce Emissions Far More Than Necessary to Resolve Its Purported Significant Contribution.

As the Court explained in *North Carolina*, EPA "is 'a creature of statute,' and has 'only those authorities conferred upon it by Congress'; 'if there is no statute conferring authority, a federal agency has none.'" 531 F.3d at 922 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). The CAA gives EPA authority to require States to ensure that their own emissions do not "contribute significantly" to nonattainment, or interference with maintenance, of NAAQS in other States. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Neither this statutory provision nor any other, however, authorizes EPA to require States to reduce emissions *below* the significant-contribution threshold.

North Carolina speaks clearly on this point, explaining that section 7410(a)(2)(D)(i)(I) gives EPA "no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution. While [an EPA rule] should achieve something measurable towards that goal, it may not require some states to exceed the mark." 531 F.3d at 921.

As already noted, EPA's modeling reflects that Texas's alleged 0.18 $\mu g/m^3$ contribution to downwind nonattainment for annual $PM_{2.5}$, *see* Final Rule, 76 Fed. Reg. at 48,240 (Table V.D-1), just barely exceeds the 0.15 $\mu g/m^3$ significance threshold, *id.* at

48,236, and is well below the alleged significant contributions of many other States. *Id.* at 48,240 (Table V.D-1). Yet the Final Rule requires Texas to reduce its 2012 annual SO_2 emissions by over 200,000 tons, or roughly 45 percent. *See id.* at 48,305 (Table VIII.A-3).

This reduction is comparable to the major reductions required of "Group 1" States such as Illinois, Missouri, and Pennsylvania, even though Texas's modeled contribution to interstate air pollution is less than half of the *least* of those other States'. *Compare id.* at 48,240-41 (Tables V.D-1, V.D- 2) *with id.* at 48,305 (Table VIII.A-3); *see also id.* at 48,214, 48,252 (reflecting the distinction between Group 1 States and Group 2 States such as Texas, *see id.* at 48,213 (Table III-1)). In fact, based on EPA's actual data from 2010 (instead of its projections for 2012), Texas is required to make the second largest SO_2 reduction of any State under the Final Rule. *Compare* 76 Fed. Reg. at 48,305 (Table VIII.A-3) *with* State Level Emissions Quick Report (2010), Environmental Protection Agency Clean Air Markets Division, http://camddataandmaps.epa.gov/gdm/index.cfm?fuseaction=emissions.wizard (follow "1980-2010 Emissions Quick Reports," select "State Level Emissions Quick Report," "2010," and "CAIR SO2 Annual Program," then click on "Get Report") (last visited Sept. 20, 2011).

EPA's treatment of Iowa also highlights its disproportionately harsh treatment of Texas. Both States are significantly linked to just one monitor (the Granite City monitor). *Id.* at 48,241. Iowa's largest downwind contribution to annual $PM_{2.5}$ nonattainment at this monitor is 0.26 $\mu g/m^3$—44 percent higher than Texas's 0.18

$\mu g/m^3$ contribution. *Id.* at 48,240. Yet the Final Rule requires Iowa to reduce its 2012 annual SO_2 emissions by only 38 percent, as compared to Texas's 45 percent. *Id.* at 48,305 (Table VIII.A-3).

EPA's only rationalization for the conspicuous disparity between Texas's comparatively small alleged downwind contribution at the Granite City monitor and the substantial amount of emissions reductions the Final Rule requires of it is based on cost-effectiveness. *Id.* at 48,246-64. EPA presumably concluded that Texas could reduce emissions more cheaply than Iowa could. *See id.* at 48,248 (noting EPA's focus on "the emission reductions available at a particular cost threshold in a specific upwind state"); *see also id.* at 48,252 (reflecting EPA's focus on the "combined reductions available from upwind contributing states"). But *North Carolina* prohibits that approach. 531 F.3d at 917-18, 921.

II. ABSENT A STAY, TEXAS WILL SUFFER IRREPARABLE INJURY.

The Court has set a high bar for showing irreparable injury. The injury "must be both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Texas meets that standard here.

A. Assuming Current Texas Weather Conditions Persist as Forecasted, the Final Rule Will Cause the State and Its Citizens to Suffer Rolling Blackouts.

Loss of utility service and resulting blackouts are irreparable injuries. *See Consol. Edison Co. of N.Y., Inc. v. Fed. Power Comm'n*, 511 F.2d 372, 378-81 (D.C. Cir. 1974) (per

curiam); *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F. Supp. 2d 1111, 1121, 1129-30 (E.D. Cal. 2001); *City of Cleveland v. Cleveland Elec. Illum. Co.*, 684 N.E.2d 343, 350 (Ohio Ct. App. 1996). And the Electric Reliability Council of Texas ("ERCOT") has already stated that, if the Final Rule had been in effect this year, rotating blackouts would have occurred in August. Luminant Exh. 9, Lasher Decl. ¶ 24. ERCOT further explains that the threat of future blackouts, which would compromise critical services and endanger lives in both the summer and winter, *id.* ¶¶ 25, 38, will persist if the Final Rule is allowed to become effective January 1. *Id.* ¶¶ 28-36.

Indeed, ERCOT now predicts that, if the Final Rule goes into effect as scheduled and 2012 weather conditions are, as anticipated, similar to current conditions, *see* ERCOT Decl. (Exh. D) ¶¶ 33 & n.6, 34, "the capacity reductions caused by [the Final Rule] would lead to unavoidable rotating outages, possibly even recurring events, which could occur in both peak and off-peak periods, through 2012 and beyond." *Id.* ¶ 45; *see also id.* ¶ 34 (explaining that "ERCOT could face greater challenges in the summer of 2012 than for 2011"). The Court should not permit that result.

B. The Final Rule Will Cause Texans to Lose Their Jobs and the State to Suffer Unrecoverable Economic Loss.

Loss of employment is an irreparable injury. *See Consol. Edison*, 511 F.2d at 380 & n.27. And although economic harm generally isn't, *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009), such harm does amount to irreparable injury when it is unrecoverable or has a serious effect on the movant. *See Sottera, Inc. v. FDA*, 627

F.3d 891, 898 (D.C. Cir. 2010); *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 67-68 (D.D.C. 2010); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997); *see also Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994) (observing that economic harm resulting from the threatened disruption of electric service can constitute irreparable injury).

One Texas corporation has already announced that, absent a timely stay of the Final Rule, it will soon be shutting down several of its operations and eliminating "approximately 500 jobs at [its] generation and mining facilities." Form 8-K at 2-3; *see* Luminant Exh. 9, Campbell Decl. ¶¶ 7, 34-35 & Exh. 2, Kopenitz Decl. ¶¶ 9, 12-13; *see also id.*, Perryman Decl. ¶¶ 31, 37, 78-82 (projecting the additional loss of over one thousand jobs). This loss of employment resulting from the legally invalid Final Rule is a significant irreparable injury.

The unrecoverable loss of tax revenue that will result from these plant and mine closures is irreparable injury as well. It will result in a host of problems at the local level, including budgeting shortfalls at cities, schools, and at least one hospital. *See* Luminant Exh. 9, Hill Decl. ¶¶ 7-8, Dehart Decl. ¶¶ 6-10, Robinson Decl. ¶¶ 9-10, 12.

Indeed, as reflected by these and several other declarations attached to Luminant's stay motion, the economic ripple effects of the Final Rule's implementation are expected to be substantial—and to have a substantial impact on the people who live in the rural communities in which Luminant's operations are located. *See id.*, C. Smith Decl. ¶¶ 3-5

(effect on Mount Pleasant and Titus County), Lee Decl. ¶¶ 7, 11-12 (explaining that Luminant's plant closure "would be devastating to Titus County"), Johnson Decl. ¶¶ 12-13 (effect on Northeast Texas Community College), Zuber Decl. ¶¶ 9-16 (effect on Freestone County), Grant Decl. ¶¶ 8-12 (same), Perlet Decl. ¶¶ 10-11 (stating that Luminant's closures will be "devastating to . . . employees and their families . . . in the Mount Pleasant and Fairfield communities"). These declarations only further emphasize the need for, and propriety of, the requested stay.

III. THE REMAINING FACTORS LIKEWISE COUNSEL IN FAVOR OF A STAY.

A. A Stay Will Not Harm Other Parties.

Under the third factor of the applicable test, the issue is whether a stay would cause serious harm to other parties. *Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam). The Court considers whether that harm is of a character similar to the stay movant's irreparable injury. *See Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982) (per curiam).

Here, there has been no indication that any other party might be harmed at all, much less seriously, by a stay of the Final Rule as it applies to Texas. Indeed, it is difficult to imagine third-party harm on the order of the irreparable injury to Texas citizens already noted. For that reason, this factor likewise favors a stay.

B. A Stay Would Further the Public Interest.

The final factor the Court should consider is "where the public interest lies."

Nken v. Holder, 129 S.Ct. 1749, 1761 (2009) (internal quotation marks omitted). It lies in granting a stay.

The public has a strong interest in reliable electricity. EGUs "provide power to [Texas] homes, farms, businesses and industries. If [an EGU's] ability to do so is imperiled, so may be its ability to fulfill its mission to the public." *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 934 (S.D. Ind. 2008). "[A] steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical." *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (per curiam); *see Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.,* 805 F.2d 351, 357 (10th Cir. 1986) (finding the public interest threatened by customers losing their source of electricity).

Irrespective of EPA's normative views about how EGUs should be able to comply with the Final Rule without curtailments and shutdowns, the reality is that many Texas EGUs cannot accomplish that feat. *See, e.g.*, Form 8-K at 2-3. As a result, and as already noted, Texas citizens will suffer in a variety of ways. *See supra* Part II.

To be sure, nationwide reductions in ozone and $PM_{2.5}$ yield health benefits. *See* Final Rule, 76 Fed. Reg. at 48,310-11. But Texas is not asking that the Final Rule be stayed in its entirety. It is asking for a partial stay of the rule as it applies to Texas and to the extent it would undo CAIR requirements that currently remain in effect. *See, e.g.*, Final Rule, 76 Fed. Reg. at 48,353-54, 48,375 (directing the Administrator to remove

CAIR allowances by November 7, 2011).

That limited relief would have no measurable impact on public health. Not even EPA claims that Texas is responsible for east coast air pollution. Under the Final Rule, Texas is significantly linked to a single monitor in Illinois, its contribution is barely above the significance threshold, and the monitor currently reflects *attainment* of the relevant NAAQS. *Id.* at 48,234, 48,240-41; Determination of Attainment, 76 Fed. Reg. at 29,652. Even assuming EPA's findings could support a claim that Texas emissions are affecting public health, that effect would be minimal. As such, the public interest strongly favors a stay of the Final Rule as it applies to Texas.

CONCLUSION

The Court should stay the Final Rule's effectiveness and compliance deadlines as to Texas and its provisions lifting CAIR requirements for the duration of judicial review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 22, 2011, I will cause the foregoing document and all of its exhibits to be served through the CM/ECF system, which will send a notice of its filing to all registered attorneys of record.

On September 22, 2011, courtesy copies of the foregoing document will also be sent via e-mail to:

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